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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

LIXIONG CHEN,

a/k/a John Chen,

Defendant.

Case No. CR-18-00450-JD

**DEFENDANT LIXIONG CHEN'S
NOTICE OF MOTION AND MOTION TO
SUPPRESS PRE- AND POST-ARREST
STATEMENTS**

Pretrial Hearing: March 25, 2019
Time: 11:00 a.m.
Court: Hon. James Donato
Location: SF Courtroom 11, 19th Fl.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 25, 2019 at 11:00 a.m., or as soon thereafter as the matter may be heard, Defendant Lixiong Chen will and hereby does move the Court, pursuant to the Fifth Amendment of the Constitution and Rule 12(b)(3)(C) of the Federal Rules of Criminal Procedure, for an Order suppressing the pre- and post-arrest statements obtained on January 23, 2019 as involuntary and in violation of Mr. Chen's Miranda rights and as involuntary under the Fifth Amendment.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the complete files and records in this matter, oral argument of counsel, the accompanying Declarations, and such other and further matters as the Court may consider.

ISSUES TO BE DECIDED

(1) Whether Mr. Chen invoked his right to counsel, such that all questioning should have stopped and Mr. Chen should not have been subjected to any further questioning until he had consulted with a lawyer, based on established precedent.

(2) Whether the Miranda advisement was violated in other material respects by failing to warn Mr. Chen that any statements he makes can be used against him in a court of law.

(3) Whether Mr. Chen executed a voluntary, knowing, and intelligent waiver of his Miranda rights.

(4) Whether Mr. Chen's statements were involuntary as the product of law enforcement coercion and not the product of Mr. Chen's rational and free will.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 21, 2019, at approximately 4:00 p.m., Mr. Chen departed Beijing for San Francisco on a delayed flight that arrived around noon PST, about 11 hours later. Declaration of John Chen, ¶ 5. Upon his arrival, Mr. Chen was exhausted from the long trip. At the time, Mr. Chen did not know that the government, aware of his flight plans, had obtained a search warrant

1 for his residence and business on January 18, 2019, and planned to execute the search warrant at
2 his residence at approximately 6:30 a.m.

3 On the morning of January 23, 2019, Mr. Chen was exhausted, sound asleep and
4 recovering from jetlag. At approximately 6:30 am, he was suddenly awakened by his mother's
5 scream and a loud commotion. Chen Decl., ¶ 7. Mr. Chen feared the worst for his mother who
6 lives with him and suffers from high-blood pressure. He immediately jumped out of bed and ran
7 downstairs where he was confronted by numerous Department of Homeland Security
8 Investigations ("HSI") agents who were present to execute a warrant for his arrest¹ and search his
9 residence. The agents had drawn their guns and were pointing them directly at Mr. Chen. *Id.* ¶ 8.
10 Mr. Chen has never been arrested or had a gun pointed at him before, and so naturally, he was
11 scared and frightened and feared for his life. He was then subjected to custodial interrogation for
12 nearly two hours.²

13 In English and Mandarin, the agents took more than ten minutes to administer the Miranda
14 warnings. Mr. Chen had many questions and repeatedly asked the agents about his rights. His
15 questions were never fully or properly answered and only further compounded his confusion. Mr.
16 Chen told the agents he certainly did not wish to waive his rights.

17 Normally, the advisement of Miranda rights takes about one minute or so with few
18 questions. The agents provided a defective Miranda advisement, conditioned the answering of
19 Mr. Chen's questions until he signed a Miranda form he could not read without his glasses, and
20 failed to obtain a *voluntarily, knowingly, and intelligently* made waiver from Mr. Chen. In
21 Mandarin, the agents redefined his Miranda rights in a defective manner and bungled the
22 advisement in other material respects. In fact, the agents failed to warn Mr. Chen in a language
23 he could understand and in a form he could comprehend that his statements could be used against
24 him in a court of law. That the agents failed to apprise Mr. Chen of his constitutionally protected
25 right is fatal and results in suppression on its own.

27 ¹ The arrest warrant is provided in Declaration of Mark L. Krotoski ¶ 4, Ex. 3.

28 ² A copy of the audio recording of the custodial interrogation has been separately provided to the Court. Key passages are noted in this brief by the audio time of the recording.

1 More fundamental, and troubling, is that Mr. Chen *unequivocally* invoked his right to
2 counsel. All questioning should have stopped. But it didn't. The agents asked Mr. Chen
3 approximately eight times after he invoked his right to counsel whether he would speak to the
4 agents and whether he would sign a waiver. The agents were persistent in their efforts to entice
5 Mr. Chen to answer their questions after he asserted his right to counsel. Under binding
6 precedent, the agents' conduct was impermissible and Mr. Chen's statements must be suppressed.
7 The Court's inquiry can end here. Based on established case law, this, alone, is sufficient to
8 warrant suppression of Mr. Chen's subsequent, post-invocation statements.

9 Other independent grounds support suppression of Mr. Chen's statements. In addition to
10 the agents' denial of Mr. Chen's invocation of his right to counsel and invalidly executed waiver,
11 Mr. Chen's statements were not the product of a free and rational will, but rather, the product of
12 coercion. As confirmed by the audio recording and an examination of the circumstances leading
13 up to, and including, the interrogation, Mr. Chen's statements were not statements made by a
14 rational or informed intellect, but of a person with significant language difficulties, an
15 inexperience of the criminal justice system, and an ignorance of the repercussions of making
16 statements to the agents in the absence of counsel. Mr. Chen's statements were the product of
17 police coercion, improper questioning tactics, and false representations that resulted in an
18 overbearing of his free will. The confusion in the agent's questions and the answers that were
19 given was based in part on the use of different languages and dialects and the inaccurate
20 advisement of rights provided by the agents. Mr. Chen repeatedly told the agents he was cold, yet
21 they did not address his concerns. The confusion and misinformation is apparent based on a
22 cursory review of the audio recording of the custodial interrogation.

23 This Motion is therefore brought to suppress Mr. Chen's pre- and post-arrest statements
24 on the basis that they were improperly made in violation of his Miranda and Fifth Amendment
25
26
27
28

rights.³ The suppression motion can be granted on the clear record, particularly based on established precedent criticizing police questioning following a suspect's invocation of his right to counsel. But if the Court considers other grounds raised in this motion, a suppression hearing will be required to resolve controverted facts and understand the circumstances of Mr. Chen's custodial interrogation. In particular, the suppression hearing will be necessary to resolve material issues concerning the totality of the circumstances in which the involuntary statements were obtained and whether Mr. Chen was properly advised of his Miranda rights, as set forth below.

II. BACKGROUND

A. HSI AGENTS EXECUTE AN ARREST WARRANT OF MR. CHEN AND SUBJECT HIM TO CUSTODIAL INTERROGATION

On January 23, 2019, at approximately 6:30 a.m., HSI agents entered Mr. Chen's home at 5648 Forbes Drive, Newark, California 94560 to execute an arrest warrant. Chen Decl. ¶¶ 8, 10, 19. The agents told Mr. Chen he was under arrest and showed him the arrest warrant. Chen Decl. ¶ 19. The agents then interrogated Mr. Chen in his home for approximately two hours. Chen Decl. ¶ 28; Declaration of Mark. L. Krotoski, ¶ 3, Ex. 1. At least four different agents interrogated Mr. Chen, though there were at least twenty agents present conducting a search of his residence. *Id.*, ¶ 10. These agents were all carrying weapons. *Id.*, at ¶ 8. Mr. Chen had no idea why so many agents were inside his home or why he was under arrest. Chen Decl. ¶ 10.

At the outset of his custodial interrogation, HSI agents informed Mr. Chen that they would read him his Miranda warnings in English and provide him a written version in Mandarin,⁴ to which Mr. Chen responded, "It's weird, what's that mean?" Krotoski Decl. ¶ 3, Ex. 1 (at 0:00:43); *id.*, ¶ 4, Ex. 2 at p. 1 (Excerpt 1).⁵ The agent then proceeded to read Mr. Chen his

³ It is unclear, given the limited discovery produced by the Government at this juncture, whether Mr. Chen made any pre-arrest statements to officers on January 23, 2019. The audio recording begins with an agent asking Mr. Chen, "Do you understand those characters?" which suggests that the initial exchanges or statements may not have been recorded. To the extent Mr. Chen made statements prior to the beginning of the audio recording, this Motion also seeks to suppress those statements.

⁴ Mr. Chen's counsel has requested a copy of the written Miranda advisement which has yet to be provided in discovery.

⁵ The time on the audio recording is provided so the cited passages may be found.

rights—in English—and asked whether Mr. Chen understood, to which he responded “uh huh.” Krotoski Decl. ¶ 3, Ex. 1 (at 0:01:16). Though Mr. Chen responded to the agent’s questions with a noncommittal, “uh huh,” he did not understand what the agent said to him. Chen Decl. ¶ 11. For Mr. Chen, the response, “uh huh,” was an acknowledgement, not a statement, that he understood the question. *Id.* Mr. Chen did not understand the English advisements and thus sought clarification in Mandarin. *Id.*

B. MR. CHEN UNEQUIVOCALLY INVOKES HIS RIGHT TO COUNSEL AND WAS PROVIDED AN INCOMPLETE AND MISLEADING ADVISEMENT OF RIGHTS

Two agents proceeded to advise Mr. Chen of his Miranda rights in Mandarin. Krotoski Decl. ¶ 3, Ex. 1 (at 0:03:15, 0:05:37). Though, the explanations provided only led to more confusion. *Id.*, ¶ 3, Ex. 1 (at 0:05:15, 0:07:52). The agents failed in one critical respect when advising Mr. Chen of his right to counsel:

SA Huang: Right, your rights mean, before you talk about anything, you can find a lawyer, you can ask for a lawyer to be present. But if now you feel that you are willing to explain things to him, it represents that you waive your rights to ask for a lawyer to be present.

Mr. Chen: Oh, then for sure, I need a lawyer.

Id., ¶ 3, Ex. 1 (at 0:05:57); *id.*, ¶ 4, Ex. 2 at p. 4 (Excerpt 4). Mr. Chen’s statement, “Oh, then for sure, I need a lawyer,” is an invocation of his right to counsel. He believed this statement to be sufficient to invoke his constitutionally protected right. Chen Decl. ¶ 16. Yet crucially, the questioning did not stop, and Mr. Chen was not afforded this protection. Instead, Special Agent Huang responded, “So now you are not willing to talk to him. When he asks you a question, you are not willing to talk to him.” Krotoski Decl. ¶ 3, Ex. 1 (at 0:06:20). Special Agent Huang asked Mr. Chen approximately 8 times after he had invoked his right to counsel whether he would speak to the agents or whether he would sign a waiver. *See, e.g., id.*, ¶ 3, Ex. 1 (at 0:06:30, 0:08:53, 0:09:02). At no point did the agents respect Mr. Chen’s invocation and make arrangements for him to speak with counsel.

Additionally, the agents provided an incomplete and misleading advisement of rights in Mandarin when they failed to warn Mr. Chen that anything he says can be used against him in a

1 court of law. Chen Decl. ¶ 27. As a result, the agents failed to apprise Mr. Chen of his
 2 constitutionally protected privilege against self-incrimination. *Id.*, ¶ 27. Mr. Chen did not know
 3 that the statements he made to the agents could be used against him in court. *Id.*

4 **C. MR. CHEN REPEATEDLY TOLD THE AGENTS THAT HE DID NOT**
 5 **WANT TO WAIVE HIS RIGHTS**

6 The agents took approximately ten minutes to advise Mr. Chen of his Miranda rights.
 7 Krotoski Decl. ¶ 3, Ex. 1. On two separate occasions when the agents asked Mr. Chen whether
 8 he would waive his rights, Mr. Chen responded, “Certainly not. I have taken my right... Uh huh, I
 9 got to taken my right. So what do you mean, just like ‘do you waive your right?’” and “Yes, don’t
 10 waive.” *Id.*, ¶ 3, Ex. 1 (at 0:02:41, 0:04:13); *id.*, ¶ 4, Ex. 2 at pp. 1, 3 (Excerpts 1 and 3).

11 Mr. Chen expressed his confusion and lack of understanding when he repeatedly asked,
 12 “Why did they say, ‘you need to waive your rights?’” *Id.*, ¶ 3, Ex. 1 (at 0:03:07, 0:03:52,
 13 0:04:33). During Mr. Chen’s 7-minute exchange in Mandarin with the agents, Mr. Chen asked
 14 the agents over 20 times to clarify the nature of his rights, the reasons for his arrest, the meaning
 15 of “waiver,” and the consequences of waiving his rights. *Id.*, ¶ 3, Ex. 1 (at 0:03:07 – 0:10:14).
 16 But rather than address any of Mr. Chen’s questions, the agents told him that if he wanted an
 17 explanation, he needed to answer their questions. *Id.*, ¶ 3, Ex. 1 (at 0:03:45) (“Are you willing to
 18 answer our question?”). But that if he wanted to answer their questions, he would first need to
 19 sign a waiver. *Id.*, ¶ 3, Ex. 1 (at 0:03:48) (“If you are willing to answer our questions, you need
 20 to sign.”). The closest Mr. Chen came to receiving an explanation was when Special Agent
 21 Huang told him that “waiving your rights means that you are willing to talk to us. We ask you
 22 questions, and you are willing to answer.” *Id.*, ¶ 3, Ex. 1 (at 0:05:48). In this way, the agents
 23 conditioned the answering of Mr. Chen’s questions on signing a Miranda form. In fact, the agents
 24 continued pressing Mr. Chen to waive his rights. *See, e.g., id.*, ¶ 3, Ex. 1 (at 0:06:29).

25 **D. MR. CHEN COULD NOT READ THE WAIVER FORM WITHOUT HIS**
 26 **GLASSES**

27 For many years, Mr. Chen has required glasses to read and write. Chen Decl. ¶ 4.
 28 Without his glasses, he cannot see or read clearly. *Id.* When HSI agents arrested Mr. Chen, he

1 was not wearing his glasses. *Id.* ¶ 26. When HSI agents provided Mr. Chen with a written
 2 waiver form at approximately ten minutes into the interrogation, he was still not wearing his
 3 glasses. *Id.*, ¶ 25. As a result, Mr. Chen could not read the waiver form, let alone understand the
 4 Miranda warnings printed on the form. *Id.* He made this much clear to Special Agent Huang
 5 approximately eighteen minutes into the custodial interrogation:

6 Mr. Chen: My glasses still up there [upstairs]

7 SA Huang: Let me tell you, you don't need to wear glasses, later.

8 Mr. Chen: I cannot see clearly without glasses.

9 SA Huang: Can you see this clearly?

10 Mr. Chen: This is blurry.
 11

12 Krotoski Decl. ¶ 3, Ex. 1 (at 0:18:37-0:18:48); *id.*, ¶ 4, Ex. 2 at p. 4-5 (Excerpt 5). When
 13 Mr. Chen indicated he could not read without his glasses, Special Agent Huang immediately
 14 responded, "you don't need to wear glasses, later." Without his glasses, Mr. Chen was therefore
 15 not able to read the waiver form. Chen Decl. ¶ 25.

16 The agents were clearly not concerned about his inability to read. When Mr. Chen said,
 17 "This is blurry," the agents should have called into question whether he was able to read the
 18 waiver form that Special Agent Huang directed him to sign in order to get answers to his
 19 questions. To everyone in the room, it should have been obvious that the writing appeared blurry
 20 to Mr. Chen and that he could not read and understand the written Miranda waiver form. Yet
 21 despite the agents later retrieving Mr. Chen's glasses, they did not have him read the waiver form.
 22 They persisted in their questioning of Mr. Chen, aware that he could not read without his glasses.
 23 Mr. Chen never read the waiver form while wearing his glasses. *Id.*

24 **E. MR. CHEN'S MENTAL STATE AT THE TIME OF HIS ARREST AND**
 25 **DURING THE INTERROGATION UNDERMINED HIS ABILITY TO**
 26 **UNDERSTAND THE WAIVER AND MAKE VOLUNTARY**
STATEMENTS

27 Throughout the Miranda process, and as well as the remaining custodial interrogation, Mr.
 28 Chen was disorientated, confused, and in a state of bewilderment. *Id.* ¶¶ 7, 11, 15, 24.

Paramount, was his concern for his mother, who was suffering with health issues. *Id.*, ¶¶ 7-8, 29. He did not know why so many agents were inside his home, and why he was under arrest. *Id.*, ¶ 10. He did not understand his Miranda rights, and what it meant to waive those rights. *Id.*, ¶ 15. He wanted answers, but the agents told him repeatedly that he would only receive an explanation if he signed a waiver of his rights. Krotoski Decl. ¶ 3, Ex. 1 (at 0:05:48). In this way, the agents conditioned Mr. Chen's requests for information on the waiver of his Miranda rights to the extent that he did not feel that he had any option other than to sign the waiver. Chen Decl. ¶ 24. Mr. Chen summarized his state of helplessness perfectly when he said to Special Agent Huang, "I don't know what it means, I still don't know what the charges are, I still don't know anything by now." Krotoski Decl. ¶ 3, Ex. 1 (at 0:07:52). Though, after ten minutes of back-and-forth questions and misinformation by the agents, Mr. Chen finally succumbed to the conditioning and pressures. He told Special Agent Huang that he wanted to answer the agents' questions and Special Agent Huang handed Mr. Chen the waiver form, telling him, "Write down here 'yes' to 'do you understand your rights' ... and then 'do you waiver your rights,' you need to say 'yes.'" *Id.*, ¶ 3, Ex. 1 (at 0:10:00). Mr. Chen did what Special Agent Huang told him to do. Chen Decl. ¶ 24. Though, he did not sign the waiver because he understood the *meaning* or the *consequences* of waiver, Mr. Chen signed it for an explanation of his arrest. *Id.*

Accordingly, Mr. Chen did not validly waive his Miranda rights. He was not fully advised of his rights in a language and form he understood, and was denied his constitutional right to counsel. For the reasons that follow, Mr. Chen's statements must be suppressed.

III. ANALYSIS

A suspect's privilege against self-incrimination is protected by the Fifth Amendment. For the government to satisfy its heavy burden to establish that Mr. Chen's statements should not be suppressed, it must show that (i) Mr. Chen did not invoke his right to counsel, (ii) after being advised of his Miranda rights in a manner, form, and language that Mr. Chen could understand, Mr. Chen made a voluntary, knowing, and intelligent waiver of his rights, and (iii) Mr. Chen's subsequent statements were voluntarily made. A failure by the government to show any one of these elements necessitates the finding that Mr. Chen's statements be suppressed.

1 **A. THE QUESTIONING OF MR. CHEN WAS A CUSTODIAL**
 2 **INTERROGATION**

3 The government must read a person his Miranda rights if he is to be subjected to custodial
 4 interrogation. *Miranda v. Arizona*, 384 US. 436, 467 (1966). “Custodial interrogation” means
 5 “questioning initiated by law enforcement officers after a person has been taken into custody or
 6 otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.
 7 Courts determine a suspect’s custodial status “based on how a reasonable person in the suspect’s
 8 situation would perceive his circumstances.” *Yarborough v. Alvarado*, 541 US. 652, 663 (2004).
 9 The custody test focuses on whether “a reasonable person [would] have felt he or she was not at
 10 liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 US. 99, 112 (1995).
 11 Often this inquiry will be resolved by a “formal arrest or restraint on [the] freedom of movement
 12 of the degree associated with a formal test.” *Id.* After resolving this inquiry, the next step is to
 13 determine whether the suspect in custody was subjected to interrogation. “The Miranda
 14 safeguards come into play whenever a person in custody is subjected to either express questioning
 15 or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980).
 16 “Interrogation... include[s] any statements or actions that the police should know are reasonably
 17 likely to elicit an incriminating response from the suspect.” *United States v. Booth*, 669 F.2d
 18 1231, 1237 (9th Cir. 1981) (citing *Rhode Island*, 446 U.S. at 300-301).

19 Here, following a lengthy investigation spanning over five years, the government applied
 20 for, and received, an arrest warrant for Mr. Chen. The HSI agents subsequently executed the
 21 arrest warrant at Mr. Chen’s home. “After making entry into [Mr. Chen’s] residence... [Mr.]
 22 Chen was informed that there was a warrant for his arrest” and “[o]n January 23, 2019, at 0726
 23 hours, Lixiong Chen was read his Miranda rights.” Krotoski Decl. ¶ 3, Ex. 1 (at 0:06:53) (“Let
 24 me tell you now, you will be arrested for sure today. This is your arrest warrant.”). Mr. Chen
 25 was clearly in ‘custody’ as he was “not at liberty to terminate the interrogation or leave.”
 26 *Thompson*, 516 U.S. 99 at 112.

27 After Mr. Chen was arrested, the HSI agents began questioning Mr. Chen about issues
 28 related to the charged Counts. The questioning was designed to elicit incriminating responses

1 from Mr. Chen, as evidenced by the nature of the questions posed. Krotoski Decl. ¶ 3, Ex. 1 (at
 2 0:28:30) (“Who’s the decision maker for the company?”); *id.*, ¶ 3, Ex. 1 (at 0:43:05) (“Questions
 3 we’re asking you, we know the answers to but we need your cooperation.”) *id.*, ¶ 3, Ex. 1 (at
 4 0:50:53) (“Who transfers all the money to China that we’ve been looking at? It’s like millions of
 5 dollars, okay.”). The structuring of the questioning and the tactics employed by the HSI
 6 agents—namely, repeatedly telling John that “we’d like to say [to the prosecutor] that you
 7 cooperated” and “that could make a big difference down the road”—is also strongly suggestive of
 8 the agents’ intentions to elicit incriminating responses from Mr. Chen. *See, e.g., id.*, ¶ 3, Ex. 1 (at
 9 0:43:05, 1:33:34, 1:44:30, 1:44:36, 1:46:46, 1:51:55). This line of questioning indicates that the
 10 agents expected answers that would incriminate Mr. Chen.

11 Because the HSI agents engaged in a custodial interrogation of Mr. Chen, he was entitled
 12 to receive, in advance of the interrogation, the appropriate Miranda warnings regarding his rights
 13 under the Fifth Amendment to the Constitution.

14 **B. MR. CHEN’S STATEMENTS MUST BE SUPPRESSED BECAUSE HE**
 15 **UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL**

16 “The *Miranda* Court formulated a warning that must be given to suspects before they can
 17 be subjected to custodial interrogation.” *Berghuis v. Thompson*, 560 U.S. 370, 380 (2010). A
 18 suspect, after being so advised, may choose to either invoke or waive his rights. “If a suspect
 19 requests counsel at any time during the interview, he is not subject to further questioning until a
 20 lawyer has been made available or the suspect himself reinitiates conversation.” *Davis v. U.S.*,
 21 512 U.S. 452, 458 (1994). “Invocation of the *Miranda* right to counsel ‘requires, at a minimum,
 22 some statement that can reasonably be construed to be an expression of a desire for the assistance
 23 of an attorney.’” *Davis*, 512 U.S. at 459; *see also United States v. de la Jara*, 973 F.2d 746, 750
 24 (9th Cir. 1992) (noting that a suspect’s words must be taken as “ordinary people would
 25 understand them”). Further, “waiver cannot be found from a suspect’s continued response to
 26 questions, even if he is again advised of his rights.” *Smith v. Endell*, 860 F.2d 1528, 1529 (9th
 27 Cir. 1988) (citing *Edwards v. U.S.*, 451 U.S. 477, 484-85 (1981)). Where a suspect invokes his
 28 right to counsel, that right must be “scrupulously honored.” *Miranda*, 384 U.S. at 479.

1 Here, after Special Agent Huang advised Mr. Chen of his right to counsel, Mr. Chen
 2 *immediately and unequivocally* invoked that right. The questioning should have stopped there, but
 3 it didn't. The following exchange between Special Agent Huang and Mr. Chen is illustrative:

4 SA Huang: Right, your rights means, before you talk about anything, you can
 5 find a lawyer, you can ask for a lawyer to be present. But if now
 6 you feel that you are willing to explain things to him, it represents
 that you waive your rights to ask for a lawyer to be present.

7 **Mr. Chen: Oh, then for sure, I need a lawyer.**

8 SA Huang: So you are not willing to talk to him? When he asks you a
 question, you are not willing to talk to him?

9 ...

10 SA Huang: You can ask for a lawyer. You still have the right to ask for a
 lawyer.

11 Mr. Chen: I can still ask for a lawyer?

12 SA Huang: Yes, he will take you to the court, the judge will ask, 'do you
 want a lawyer, or do you want them to assign a lawyer to you.'

13 Mr. Chen: I just want to know, now, I just want to ask what the issue is, right
 here, they can ask me, like this.

14 Krotoski Decl. ¶ 3, Ex. 1 (at 0:05:57, 0:09:18) (emphasis added); *id.*, ¶ 4, Ex. 2 at p. 4
 15 (Excerpt 4). The above exchange demonstrates that Mr. Chen made the requisite "expression of a
 16 desire" for the assistance of counsel when he said: "Oh, then for sure, I need a lawyer." Such
 17 expression qualifies as an unequivocal invocation of his right to counsel. *See Smith v. Illinois*,
 18 469 U.S. 91, 97 (1984) (deeming a suspect's statement, "Uh, yeah, I'd like to do that," upon
 19 hearing of his right to counsel a clear invocation); *de la Jara*, 973 F.2d at 750 (deeming, "Can I
 20 call my attorney?" or "I should call my lawyer," a clear invocation of the right to counsel);
 21 *Robinson v. Borg*, 918 F.2d 1387, 1389 (9th Cir. 1990) (deeming, "I have to get me a good
 22 lawyer, man. Can I make a phone call?" a clear invocation of the right to counsel); *Smith*, 860
 23 F.2d at 1529-31 (deeming "Can I talk to a lawyer?" a clear invocation of the right to counsel).

24 On this point, *Alvarez v. Gomez* is dispositive. 185 F.3d 995 (9th Cir. 1999). In *Alvarez*,
 25 the Ninth Circuit considered whether the trial court erred by admitting the defendant's statements
 26 because he had invoked his right to counsel at the beginning of the interrogation. *Alvarez*, 185
 27 F.3d at 997. Because *Alvarez* squarely addresses the issue, the relevant exchange between the
 28 defendant and the officers is set out below:

1 Officer 1: Okay. Do you want to give up the right to remain silent? Mario,
2 you wanna talk about this incident?
3 Alvarez: Can I get an attorney right now, man?
4 Officer 1: Pardon me?
5 Alvarez: You can have attorney right now?
6 Officer 1: Ah, you can have one appointed for you, yes.
7 Alvarez: Well, like right now you got one?
8 Officer 1: We don't have one here, no. There's not one present now.
9 Officer 2: There will be one appointed to you at the arraignment, ah,
10 whether you can afford one. If you can't one will be appointed to
11 you by the court.
12 Alvarez: All right.
13 Officer 1: (says something unintelligible)
14 Alvarez: I'll - I'll talk to you guys.
15 Officer 1: Okay. You wanna talk to us without a lawyer here, right?
16 Alvarez: Yeah.

17 *Id.*, at 996-97. The Ninth Circuit, in reversing Alvarez's conviction, found that Alvarez
18 had made the requisite "expression of a desire" for the help of a lawyer. *Id.*, at 998. As a result,
19 "the police should have discontinued the interview at that point and not subjected Alvarez to any
20 further questioning until after he had had an opportunity to consult with a lawyer or until he, on
21 his own initiative, resumed the conversation." *Id.* The court rejected the theory that Alvarez
22 "was merely asking clarifying questions regarding his right to counsel" and found the defendant's
23 waiver to be invalid. *Id.* Accordingly, the statements should have been suppressed "[b]ecause
24 Alvarez's subsequent Miranda waivers in the recorded interviews were in response to further
25 police initiated questioning... [and] are without effect." *Id.*

26 *Alvarez* compels suppression. Just like in *Alvarez*, Mr. Chen invoked his right to counsel
27 when the agents asked him if he was willing to talk to them. Just like in *Alvarez*, the agents told
28 Mr. Chen that an attorney was not presently available, but would be appointed by the court at a
29 later time. Then, just like in *Alvarez*, Mr. Chen waived his Miranda rights in response to further
30 police questioning.

31 Mr. Chen's exchange with Special Agent Huang demonstrates that he had unequivocally
32 requested the assistance of counsel. The questioning should have discontinued at that point and
33 Mr. Chen should not have been subjected to any further questioning until he had consulted with a
34 lawyer. It does not matter that Mr. Chen continued responding to the agents' statements, because

1 a valid waiver “cannot be established by showing only that [the accused] responded to further
2 police-initiated custodial interrogation.” *Id.* (citing *Edwards*, 451 U.S. at 484); *see also Desire v.*
3 *Attorney General of California*, 969 F.2d 802, 805 (9th Cir. 1992) (defendant’s “unhonored
4 request for counsel vitiates his subsequent decision to talk without counsel’s presence.”).

5 The agents were required to “scrupulously honor” Mr. Chen’s right to counsel and cease
6 all further questioning until Mr. Chen had been given the opportunity to consult with counsel.
7 *Miranda*, 384 U.S. at 479. Because the government failed to do so, the Court’s inquiry can end
8 here. Mr. Chen’s statements must be suppressed.

9 **C. MR. CHEN’S STATEMENTS MUST BE SUPPRESSED BECAUSE HE DID**
10 **NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE**
11 **HIS MIRANDA RIGHTS**

12 Even if the Court finds that Mr. Chen did not invoke his right to counsel, Mr. Chen’s
13 statements must still be suppressed because he did not voluntarily, knowingly, and intelligently
14 waive his Miranda rights. A suspect subject to custodial interrogation, after being advised of his
15 rights under the Fifth Amendment, may choose to waive those rights. *Miranda*, 384 U.S. at 436.
16 “To be valid, a waiver of Miranda rights must be *voluntarily, knowingly, and intelligently* made.”
17 *United States v. Bernard S.*, 795 F.2d 749, 751 (citing *Miranda*, 384 U.S. at 444 (emphasis
18 added)). The focus is on whether the defendant acted with a “full awareness of both the nature of
19 the right being abandoned and the consequences of the decision to abandon it.” *Moran v.*
20 *Burbine*, 475 U.S. 412, 421 (1986). A valid waiver of Miranda rights depends on the totality of
21 the circumstances, including the background, experience and conduct of the defendant.” *Bernard*
22 *S.*, 795 F.2d at 751 (citing *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979)).

23 In a case involving a foreign national, the court must also consider any language
24 difficulties encountered by the defendant. *See United States v. Heredia-Fernandez*, 756 F.2d
25 1412, 1415 (9th Cir. 1985), *cert. denied*, 474 U.S. 836 (1985); *see also United States v. Martinez*,
26 588 F.2d 1227, 1235 (9th Cir. 1978) (assuming “without so holding that if Miranda warnings are
27 given in a language which the person being so instructed does not understand, a waiver of those
28 rights would not be valid.”). The court must also assess voluntariness by examining “whether the
advice of rights was in the defendant’s native language, whether the defendant appeared to

1 understand those rights, whether the defendant had the assistance of a translator, whether the
 2 defendant's rights were explained painstakingly, and whether the defendant had experience with
 3 the American criminal justice system.” *United States v. Amano*, 229 F.3d 801, 804-05 (9th Cir.
 4 2000).

5 There is a presumption against waiver, and the burden of showing a valid waiver is on the
 6 government under a preponderance of the evidence standard. *Butler*, 441 U.S. at 373; *United*
 7 *States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985). The government’s burden to make such a
 8 showing “is great,” and the court will “indulge every reasonable presumption against waiver of
 9 fundamental constitutional rights.” *United States v. Heldt*, 745 F.2d 1275, 1277 (9th Cir. 1984)
 10 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

11 When viewed under the totality of the circumstances, Mr. Chen did not voluntarily,
 12 knowingly, and intelligently waive his Miranda rights. That the entire waiver process took
 13 approximately ten minutes—that is, ten minutes for the government to read Mr. Chen his *four*
 14 Miranda rights and extract a waiver—is telling. A review of the audio recording demonstrates
 15 clearly that, despite waiver, he did not *understand* the nature of the rights being abandoned and
 16 the *consequences* of the decision to abandon those rights. *See Moran*, 475 U.S. at 421. In
 17 particular, Mr. Chen repeatedly sought clarification from the agents as to the meaning of
 18 “waiver,” Mr. Chen’s language difficulties impeded his ability to understand the English
 19 recitation of his Miranda rights and Special Agent Huang bungled the Mandarin recitation, Mr.
 20 Chen could not read the written waiver form because he was not wearing his glasses, and Mr.
 21 Chen’s mental state at the time of waiver impacted on his ability to understand its meaning.

22 Under a totality of the circumstances approach, Mr. Chen did not voluntarily, knowingly,
 23 and intelligently waive his rights.

24 1. After Mr. Chen Repeatedly Said That He Did Not Understand The Waiver
 25 Or Why He Needed To Waive His Rights, The Government Failed To
 Clarify And Kept Asking Mr. Chen To Sign The Waiver

26 The government’s duty to obtain an unequivocal waiver requires it to clarify any
 27 ambiguities in the suspect’s understanding of the waiver prior to interrogating the suspect. *See*
 28 *United States v. Rodriguez*, 518 F.3d 1072, 1080 (9th Cir. 2008). “Prior to obtaining an

1 unambiguous and unequivocal waiver, a duty rests with the interrogating officer to clarify any
 2 ambiguity before beginning general interrogation... [T]he government cannot meet its ‘heavy
 3 burden’ of proving an initial knowing and intelligent waiver of Miranda with an ambiguous or
 4 equivocal reference to *Miranda* rights.” *Rodriguez*, 518 F.3d at 1080.

5 Mr. Chen did not understand the English recitation of the Miranda warnings. When Mr.
 6 Chen sought clarification from the Mandarin-speaking Agents, the Miranda warnings provided to
 7 him were (a) incomplete, and (b) orally explained and redefined in Mandarin in a substantially
 8 different form to the way in which the warnings were given both orally in English and written on
 9 the waiver form. *See* Krotoski Decl. ¶ 3, Ex. 1 (at 0:00:17, 0:05:57); Chen Decl. ¶ 27. When the
 10 agents asked Mr. Chen whether he waived his rights, Mr. Chen affirmatively responded:
 11 “Certainly not. I have taken my rights.” Krotoski Decl. ¶ 3, Ex. 1 (at 0:02:41). He is then
 12 repeatedly heard asking the agents why he needs to waive his rights. *See, e.g., id.*, ¶ 3, Ex. 1 (at
 13 0:02:45) (“What do you mean, just like ‘do you waive your right?’”); *id.*, ¶ 3, Ex. 1 (at 0:03:07)
 14 (“Ah, why did he say that you need to waive your rights?”); *id.*, ¶ 3, Ex. 1 (at 0:03:52) (“Why did
 15 they say, you need to waive your rights?”); *id.*, ¶ 3, Ex. 1 (at 0:04:33) (“I just don’t understand, I
 16 am OK with other things, but just this – why it says you need to waive your rights?”); *id.*, ¶ 3, Ex.
 17 1 (at 0:07:52) (“So, I don’t know what it means [referring to waiver], I still don’t know what the
 18 charges are, I still don’t know anything by now.”). There is clear ambiguity present here. On this
 19 point, *Rodriguez* is dispositive.

20 In *Rodriguez*, the Ninth Circuit made clear that, in an initial-waiver scenario, interrogating
 21 officers must clarify ambiguous responses to Miranda warnings. *Rodriguez*, 518 F.3d at 1074.
 22 There, the defendant was asked whether he waived his Miranda rights, to which he responded,
 23 “I’m good for tonight.” *Id.*, at 1075. The court found this statement to be ambiguous and not
 24 sufficient to amount to an unequivocal waiver of his Miranda rights. *Id.*, at 1080. “Because
 25 [defendant’s] statement in response to the *Miranda* warning was ambiguous, and because his
 26 interrogator failed to clarify [defendant’s] wishes with respect to his Miranda warnings,” the
 27 defendant did not voluntarily, knowingly, and intelligently waive his Miranda rights. *Id.*, at 1081.
 28 The court subsequently reversed the defendant’s conviction, noting that “[i]f it is not

1 unreasonable to ask a police officer to administer the warning, it is also not unreasonable to ask
2 him to get an unequivocal waiver before commencing general interrogation.” *Id.* at 1079 n.7.

3 Other courts have also held that government agents must clarify a defendant’s rights
4 where the explanation of the rights was confusing or where the defendant asked a question about
5 the rights. In *United States v. Al-Saimari*, 982 F. Supp. 2d 1285 (D. Utah 2013), for example,
6 agents advised the defendant of his rights and asked whether he wanted to talk. The defendant
7 said “I don’t know, you know. I’m just surprised, you know.” *Id.*, at 1287. The agent then
8 reiterated that he needed a “yes or a no” answer.” *Id.* That follow-up response, according to the
9 district court, was insufficient, rendering the *Miranda* warnings invalid. *Id.*, at 1290–91. And in
10 considering the implications of its decision, the court reasoned that “the Fifth Amendment merely
11 demands that an officer ask follow-up questions as necessary to establish a knowing and
12 voluntary waiver when, as was the case with Mr. Al–Saimari, a suspect expresses or manifests
13 confusion, or fails to state affirmatively that he understands the *Miranda* warnings.” *Id.*, at 1292;
14 *see also United States v. Botello-Rosales*, 728 F.3d 865, 867 (9th Cir. 2013) (“That officers had
15 previously administered correct *Miranda* warnings in English to [the defendant] does not cure the
16 constitutional infirmity [in the defective warnings].”).

17 Mr. Chen’s situation is analogous to *Rodriguez* and *Al-Saimari* and the reasoning from
18 those cases yields the same conclusion here. Just like in those cases, Mr. Chen’s responses to the
19 agent’s recitation of his *Miranda* warnings were ambiguous and *clearly* established his lack of
20 understanding of “waiver.” As a result, the government had an affirmative duty to clarify Mr.
21 Chen’s ambiguities and explain the meaning and consequences of waiver. But the agents did not
22 do so. Instead, they avoided his queries and repeatedly challenged his decision to cooperate: “So
23 now you are not willing to talk to him? When he asks you a question, you are not willing to talk
24 to him?” Krotoski Decl. ¶ 3, Ex. 1 (at 0:06:20). Mr. Chen did all he could to understand his
25 rights by repeatedly asking for clarification, yet the agents failed in their duty to clear up his
26 uncertainties. As a result of the agent’s failure, Mr. Chen could not, and *did not*, execute a
27 voluntary, knowing, and intelligent waiver. In fact, Mr. Chen has sworn that he did not
28 understand what it meant to waive his rights and the consequences of doing so. Chen Decl. ¶¶ 15,

23. Accordingly, the government cannot meet its “heavy burden” of proving that it obtained an unequivocal waiver before commencing its interrogation of Mr. Chen. It follows that Mr. Chen’s statements must be suppressed.

2. The Government’s Failure To Advise Mr. Chen Of His Miranda Rights And The Consequences Of Waiver In Mandarin Precludes The Purported Waiver From Being Knowing and Intelligent

In a situation where the suspect is a foreign national, language barriers are highly relevant to a suspect’s ability to understand his rights. *See Amano*, 229 F.3d at 804–05. The Ninth Circuit has stated that language difficulties may impair the ability of a person in custody to waive his Miranda rights in a free and aware manner. *See United States v. Gonzales*, 749 F.2d 1329, 1335–36 (9th Cir. 1978). Where the suspect has language difficulties, the Ninth Circuit determines the validity of a waiver by considering the suspect’s level of understanding of English, *see United States v. Bernard S.*, 795 F.2d 749, 752 (9th Cir. 1986) (defendant “admitted that he studied English through seventh grade.”); *see also Amano*, 229 F.3d at 805 (“Defendant appeared to understand and converse comfortably in English.”), and whether the warnings were properly given in the suspect’s native language, *see Martinez*, 588 F.2d at 1235 (“We assume... that if Miranda warnings are given in a language which the person being so instructed does not understand, a waiver of those rights would not be valid.”).

Here, Mr. Chen has a limited ability to understand and read English. Chen Decl. ¶ 11. His language difficulties are littered throughout the audio recording and are readily identifiable during the Miranda process. Initially, the agents read Mr. Chen his Miranda rights in English and asked whether he understood his rights, to which Mr. Chen responded, “uh huh.” *See, e.g.*, Krotoski Decl. ¶ 3, Ex. 1 (at 0:01:17, 0:01:29, 0:01:39). Mr. Chen’s noncommittal response is not indicative nor remotely demonstrative that he actually understood his rights, particularly in light of the fact that Mr. Chen’s native language is Mandarin and he has demonstrated *no* ability to “converse comfortably in English.” Chen Decl. ¶ 11. Mr. Chen spends a limited time in the U.S. each year. During that time, Mr. Chen is surrounded by other Mandarin-speaking family and persons. Chen Decl. ¶ 3.

1 When asked whether he waived his rights, Mr. Chen repeatedly sought clarification from
 2 Special Agent Huang about what was meant by “waive.” Krotoski Decl. ¶ 3, Ex. 1 (at 0:03:07,
 3 0:05:45) (“Ah, why did he say that you need to waive your rights?”); Chen Decl. ¶¶ 13, 15. That
 4 Mr. Chen was required to seek clarification in Mandarin further illustrates his lack of
 5 understanding of the English recitation of the Miranda warnings. Additionally, Special Agent
 6 Huang *failed* to properly recite the Miranda warnings. At no point did Special Agent Huang, in
 7 her exchange with Mr. Chen, warn him that any statements he made could be used against him in
 8 a court of law. *See, e.g.*, Krotoski Decl. ¶ 3, Ex. 1 (at 0:05:34 – 0:10:14). It follows that Mr.
 9 Chen did not, and *could not*, make a voluntary, knowing, and intelligent decision to waive his
 10 rights because he did not know about his privilege against self-incrimination.

11 A waiver can never be knowing and intelligent if the government obfuscates the scope of
 12 a critical Miranda right. *Miranda*, 384 U.S. at 444. Though there is no precise formulation of the
 13 warnings, *Miranda* provides that the warnings are “in the absence of a fully effective equivalent,
 14 *prerequisites* to the admissibility of any statement made by a defendant.” *Id.*, at 476 (emphasis
 15 applied). There was no “fully effective equivalent,” just the failure to warn Mr. Chen of all his
 16 rights. Even if the English recitation of the Miranda warnings was proper and Mr. Chen
 17 understood them, it “does not cure the constitutional infirmity,” because of the confusion created
 18 by the two inconsistent warnings. *Botello-Rosales*, 728 F.3d at 867 (“Even if [defendant]
 19 understood the English-language warnings, there is no indication in the record that the
 20 government clarified which set of warnings was correct.”); *see also United States v. San Juan-*
 21 *Cruz*, 314 F.3d 384, 388-89 (9th Cir. 2002) (“When a warning, not consistent with *Miranda*, is
 22 given prior to, after, or simultaneously with a *Miranda* warning, the risk of confusion is
 23 substantial, such that the onus is on the Government to clarify to the arrested party the nature of
 24 his or her rights under the Fifth Amendment.”). Such an error on the part of the government is
 25 fatal as it materially affected Mr. Chen’s ability to make an informed waiver decision.

3. The Government Cannot Cure Its Defective Miranda Warnings By Claiming That Mr. Chen Signed A Waiver Form Because Mr. Chen Could Not Read The Waiver Form

In addition to the above, as one factor, courts resolve the issue of whether a waiver was valid by looking to whether the suspect was given the Miranda warnings in a written form that he could read and understand. *Gonzales*, 749 F.2d at 1336 (“Even if [defendant] spoke very poor Spanish and appellant spoke very poor English, the written Spanish would have conveyed to [defendant] a sufficient understanding of his rights.”). However, the factual circumstances are important. In cases where the court has found the waiver to be valid, it has based its finding on the suspect’s ability to *read* the written Miranda warnings and *understand* the nature of his rights and consequences of abandoning them. *See id.*; *see also Martinez*, 588 F.2d at 1227; *Heredia-Fernandez*, 756 F.2d at 1415.

That Mr. Chen signed a waiver form is not dispositive of the critical question of whether he made the waiver with a full awareness of the *nature* of his Miranda rights and the *consequences* of abandoning them. *See Bernard S.*, 795 F.2d at 753, n. 4 (quoting *Binder*, 769 F.2d at 599). In contrast to *Gonzales*, Mr. Chen could not read, let alone understand, his Miranda rights in its written form because he was not wearing his glasses at the time he was directed to sign the form.

He made this much clear to the agents:

Mr. Chen: I cannot see clearly without glasses.

Agent: Can you see this clearly?

Mr. Chen: This is blurry.

Krotoski Decl. ¶ 3, Ex. 1 (at 0:18:44-0:18:48). The government may not therefore rely on the signed waiver form as evidence that Mr. Chen *understood* what he was waiving. Because Mr. Chen suffers from poor eyesight and is unable to read or see things clearly without his glasses, he could not read the waiver form. Chen Decl. ¶ 25. Accordingly, Mr. Chen could not voluntarily, knowingly, and intelligently waive his rights and his subsequent statements must be suppressed.

4. Mr. Chen Was Not In The Right State Of Mind To Understand The Nature Of His Miranda Rights And The Consequences Of Abandoning Them

Courts look to the defendant's subjective state of mind at the time of waiver to determine its validity. *See United States v. Wolf*, 813 F.2d 970, 975 n.16 (9th Cir. 1987). At the time Mr. Chen signed the waiver, his mental state was such that he could not possibly have understood its meaning or its consequences.

Mr. Chen had only recently returned to the U.S. after a lengthy flight from Beijing. Chen Decl. ¶ 5, Exs. 1, 2. He was jetlagged, adjusting to the 8-hour time difference, and *asleep* when the police barged into his home before 6:30 a.m. on January 23, 2019. *Id.* ¶ 7. He woke to the noise and commotion created by the agents' entry into his home and was arrested and subjected to immediate interrogation. *Id.*, ¶¶ 8, 11. Mr. Chen was scared, concerned, and uncertain as to what was happening to him. *Id.*, ¶ 8. But even more so, Mr. Chen was concerned for *his mother*. *Id.*, ¶¶ 7-8.

The effect that Mr. Chen's mother's presence throughout this entire ordeal had on his state of mind cannot be ignored. Mr. Chen's mother has health issues and her welfare was all that Mr. Chen could think of during the custodial interrogation. *Id.*, ¶¶ 7-8, 29. He repeatedly asked the agents about his mother's welfare, whether she had taken her medicine, whether she could eat, whether she could lie down, and whether she would be told what was happening to him. Krotoski Decl. ¶ 3, Ex. 1 (at 0:11:56) ("Then could you tell my mom later, what exactly is the reason."); *id.*, ¶ 3, Ex. 1 (at 0:45:12) ("What's wrong? My mom wants to go to the restroom."); *id.*, ¶ 3, Ex. 1 (at 1:06:42) ("Where is my mom?"); *id.*, ¶ 3, Ex. 1 (at 1:06:53) ("Is OK my mom?"); *id.*, ¶ 3, Ex. 1 (at 1:50:31) ("She has high blood pressure."); *id.*, ¶ 3, Ex. 1 (at 1:53:23) ("You just lie down, you need to be cautious about your blood pressure. It is OK here."). That Mr. Chen's mother repeatedly interrupted her son's custodial interrogation only acted as a further reminder to Mr. Chen that his mother was present and witnessing her son's arrest. *See, e.g., id.*, ¶ 3, Ex. 1 (at 0:18:33, 0:23:58, 0:25:08, 0:45:05, 0:45:16, 1:10:16, 1:10:26, 1:10:32, 1:11:09, 1:48:35, 1:50:27, 1:50:38, 1:51:42, 1:50:51, 1:52:03, 1:52:29, 1:52:47, 1:52:53, 1:53:04, 1:53:26, 1:53:36.). These

1 constant references to his mother demonstrates that Mr. Chen’s mind was focused on his mother
2 and not himself.

3 Each of the factors set out above, considered in the totality of the circumstances,
4 establishes that Mr. Chen did not voluntarily, knowingly, and intelligently waive his Miranda
5 rights. The oral advisements were not clear—both because he cannot clearly understand English
6 and because Special Agent Huang bungled the Mandarin advisement—and he was not able to
7 read the waiver form. Even if they were clear, which they were not, Mr. Chen was of such a
8 confused, scared, concerned, and preoccupied state of mind that he did not, and could not,
9 understand the meaning and consequences of waiving his rights. Accordingly, Mr. Chen did not
10 voluntarily, knowingly, and intelligently waive his Miranda rights, and his subsequent statements
11 must be suppressed. *Miranda*, 384 U.S. at 444. The inquiry can end here.

12 **D. MR. CHEN’S STATEMENTS WERE INVOLUNTARY, THE PRODUCT**
13 **OF COERCION AND NOT THE PRODUCT OF A FREE AND RATIONAL**
14 **WILL**

15 Even if the court finds that Mr. Chen did not invoke his right to counsel and made a
16 voluntary, knowing, and intelligent waiver of his rights, his statements must still be suppressed if
17 they were not given voluntarily. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v.*
18 *Pinion*, 800 F.2d 976, 980 (9th Cir. 1986). The court’s focus is on “whether [the] defendant’s will
19 was overborne by the circumstances surrounding the giving of [the] confession,” an inquiry that
20 “takes into consideration the totality of all the surrounding circumstances—both the
21 characteristics of the accused and the details of the interrogation.” *Dickerson v. U.S.*, 530 U.S.
22 428, 434 (2000). The test of voluntariness is well-established: “Is the confession the product of
23 an essentially free and unconstrained choice by its maker?... The line of distinction is that at
24 which governing self-direction is lost *and compulsion, of whatever nature or however infused,*
25 *propels or helps to propel the confession.*” *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991)
26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)) (emphasis added). The
27 voluntariness inquiry “is not limited to instances in which the claim is that the police conduct was
28 inherently coercive. It applies equally when the interrogation techniques were improper only
because, in the particular circumstances of the case, the confession is unlikely to have been the

1 product of a free and rational will.” *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (internal citations
 2 omitted); *see also Wolf*, 813 F.2d at 974 (voluntariness determination focuses on the “defendant’s
 3 state of mind at the time of confession”). The voluntariness determination must be decided on the
 4 peculiar, individual set of facts of each case. *Culombe v. Connecticut*, 367 U.S. 568, 622 (1961).
 5 The burden of demonstrating that a confession is voluntary lies with the government. *Brown v.*
 6 *Illinois*, 422 U.S. 590, 604 (1974); *United States v. Crespo de Llano*, 838 F.2d 1006, 1015 (9th
 7 Cir. 1988).

8 Here, Mr. Chen’s statements were not “the product of an essentially free and
 9 unconstrained choice.” *Collazo*, 940 F.2d at 416 (quoting *Culombe*, 367 U.S. at 602). An
 10 examination of the circumstances leading up to, and including, the interrogation reveals that Mr.
 11 Chen’s statements were not statements made by a rational or informed intellect, but of a person
 12 with significant language difficulties, an inexperience of the criminal justice system, and an
 13 ignorance of the repercussions of making statements to the agents in the absence of counsel. Mr.
 14 Chen’s statements were the product of police coercion, improper questioning tactics, and false
 15 representations that resulted in an overbearing of his free will. *See United States v. Preston*, 751
 16 F.3d 1008, 1026 (9th Cir. 2014). As a result, the totality of circumstances surrounding the giving
 17 of statements weighs heavily in favor of a finding that they were not made voluntarily.

18 In *Rodriguez*, the Ninth Circuit, in reversing the defendant’s conviction, held that the
 19 tactics employed by officers when questioning a suspect is a relevant factor in determining the
 20 voluntariness of a confession. *Rodriguez v. McDonald*, 872 F.3d 908, 922 (9th Cir. 2017).
 21 There, the officers made various statements designed to pressure the defendant into cooperating.
 22 *Id.*, at 923-24. In particular, the officers told the defendant that his cooperation would result in
 23 leniency and that the prosecutor would be told about the defendant’s cooperation. *Id.* at 924. The
 24 officers also told the defendant that he would be charged later that day, thereby “increasing the
 25 urgency of cooperation.” *Id.* The court found that these statements suggested to the defendant
 26 that “he would be penalized if he exercised his rights guaranteed to him under the Constitution of
 27 the United States.” *Id.*

Here, like in *Rodriguez*, the agents' tactics coerced Mr. Chen into making statements that were not the "product of an essentially free and unconstrained choice." *Collazo*, 940 F.2d at 416. The agents repeatedly told Mr. Chen that they'd "like to say that you cooperated and [the prosecutor] would like to see that you cooperated," and that cooperation "could make a big difference down the road." Krotoski Decl. ¶ 3, Ex. 1 (at 1:44:30, 1:44:36). The agents also repeatedly told Mr. Chen that "you will go to prison today... but before that, if you want to talk to us." *Id.*, ¶ 3, Ex. 1 (at 0:07:31). Further, the agents repeatedly challenged the veracity of Mr. Chen's responses, telling him that they "don't believe his story," that he is "lying," that he will be in "some serious trouble," and that he could go to prison for "twenty years." *Id.*, ¶ 3, Ex. 1 (at 1:33:17, 1:43:43). The following statement is illustrative of the agents' coercive tactics and representative of the way in which the agents generally conducted the interrogation:

Agent: You're going to be in trouble if you tell the same story to members of the community. Like what we're talking about here is smuggling goods into the United States against the law. Importing counterfeit goods. It's twenty years in federal prison and if you tell the same story to members of the community that are sitting on a criminal trial, you're going to be in some serious trouble. They're not going to believe this story. We don't believe this story. We want to know, we're going to give you one more chance and that's it. When we submit, when Dan submits his report to the prosecutor, we'd like to say that you cooperated and they would like to see that you cooperated.

Id., ¶ 3, Ex. 1 (at 1:43:43). This statement highlights the coercive nature of the interrogation and the pressures imposed on Mr. Chen to make incriminating and *involuntary* statements. The agents were verbally aggressive toward Mr. Chen during the interrogation, challenged the veracity of his statements, repeatedly accused John of lying, and overhyped the volume of evidence they currently possessed. *See, e.g., id.*, ¶ 3, Ex. 1 (at 0:43:05) ("Questions we're asking you, we know the answers to but we need your cooperation."); *id.*, ¶ 3, Ex. 1 (at 0:58:42) ("It is obvious that you are not being truthful – you know what I mean?"); *id.*, ¶ 3, Ex. 1 (at 1:21:37) ("This is the third time I'm telling you. We know a lot of it, but we would like you to tell us the truth."); *id.*, ¶ 3, Ex. 1 (at 1:30:14) ("I'm in China, blah blah blah. For somebody that's the owner and president of a company... Like you don't know much of anything?"); *id.*, ¶

3, Ex. 1(at 1:33:17) (“We’re not going to sit here all day and listen to any more of your lies.”); *see also* Chen Decl. ¶ 28. The statements and accusations levelled at Mr. Chen increased not only the level of tension in the interrogation room, but also the coercive nature of the environment. These tactics are precisely of the kind cautioned by the Ninth Circuit in *Rodriguez* that would render any subsequent statements involuntary.

E. A SUPPRESSION HEARING IS NOT REQUIRED ON AN INVOCATION OF COUNSEL BUT IS REQUIRED TO RESOLVE OTHER CONTROVERTED FACTUAL ISSUES

In the Ninth Circuit, “[a]n evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.” *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000); *see also United States v. Batiste*, 868 F.2d 1089 (9th Cir. 1989) (decision to hold an evidentiary hearing based on the fact that the defendant did not have complete information regarding his arrest at the time the motion to suppress was filed and could obtain information from the officers’ testimony at the hearing). The record is clear that Mr. Chen invoked his right to counsel. *See* Krotoski Decl. ¶ 4, Ex. 2 at p. 4 (Excerpt 4). The suppression motion can be granted on the clear record, particularly based on established precedent.

If the Court considers other grounds raised in this motion, a suppression hearing will be required to resolve other controverted facts and understand the circumstances of Mr. Chen’s custodial interrogation. In particular, the suppression hearing will be necessary to resolve material issues concerning the totality of the circumstances in which the involuntary statements were obtained and the extent to which the Mandarin language was used to misinform Mr. Chen of his Miranda rights. A suppression hearing will also allow the court to ask questions arising out of the audio recording and clarify the circumstances of what transpired during the custodial interrogation.

IV. PRODUCTION OF STATEMENTS OF GOVERNMENT WITNESSES

Under Fed. R. Crim. P. 12(h), Mr. Chen requests production of Jencks Act and Fed. R. Crim. P. 26.2 statements for any government witnesses with sufficient time to review in advance of the suppression hearing.

V. CONCLUSION

For the foregoing reasons, Defendant Lixiong Chen respectfully asks that the Court grant his Motion to Suppress on the written record or, in the alternative, schedule an evidentiary hearing on his Motion to Suppress. A Proposed Order is concurrently filed with this motion.

Dated: March 06, 2019

Respectfully Submitted,

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